Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ERIC M BETTS; SUSAN BETTS, PETITIONERS

v.

NEW CASTLE YOUTH DEVELOPMENT CENTER ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit required statistical support in order to establish an Eighth Amendment violation. No Supreme Court case has held that statistical support regarding the frequency of a past injury is required under Eighth Amendment jurisprudence.

I. Did the Third Circuit improperly broaden the requirements for establishing an Eighth Amendment violation?

Respondents knew that allowing children to play full contact football, without protective equipment, presented a serious and excessive risk of harm to Petitioner. Petitioner played tackle football, without protective equipment, while under Respondents' care and suffered a catastrophic spinal cord injury rendering him a quadriplegic.

II. Did Petitioner suffer a serious constitutional deprivation because Respondents deliberately disregarded an excessive risk of harm to Petitioner's health and safety?

PARTIES TO THE PROCEEDING

ERIC M BETTS; SUSAN BETTS, Petitioners

v.

NEW CASTLE YOUTH DEVELOPMENT CENTER; KENNETH WENT, in his individual and official capacity; CHARLES MITCHAM, in his individual and official capacity; DAVID TOMOCHECK, in his individual and official capacity; OMAR STUART, in his individual and official capacity; WILLIE BLUE, in his individual and official capacity; TAMMY A ODEM, in her individual and official capacity; JOHN DOE, in his individual and official capacity

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OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania ("District Court") is reported at 2009 WL 2913846 (W.D. Pa. 2009). S.C. App. 24a.[1] The opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit") is reported at 621 F.3d 249 (3d Cir. 2010). S.C. App. 1a.

JURISDICTION

The Third Circuit denied Petitioners' petition for rehearing *en banc* on October 22, 2010. S.C. App. 43a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). This appeal is timely pursuant to Supreme Court Rule 13(3).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment 8:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

Head injuries, including concussions and paralysis, in the game of football, have long been a subject of deep concern, much study and even Congressional hearings. This case continues the

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[1]Reference to the attached Appendix in support of the Petition for Writ of Certiorari will be S.C. App.___a. Reference to the Appendix before the Third Circuit will be A-___ or SA-___.

discourse and involves the catastrophic spinal cord injuries, including quadriplegia, suffered by Petitioner Eric Betts at New Castle Youth Development Center ("New Castle") while he was encouraged to play tackle football without protective equipment.

Petitioners Eric Betts and his mother Susan Betts ("Petitioner" or collectively, "Petitioners") filed an action pursuant to 42 U.S.C. §1983 against Respondents, premised upon the Eighth and Fourteenth Amendments to the United States Constitution. On September 8, 2009, the District Court granted summary judgment on all counts. S.C. App. 24a. The District Court held that New Castle was immune from suit under the Eleventh Amendment. S.C. App. 28a. As to the remaining individual Respondents, the District Court held that allowing residents to play tackle football, without equipment, did not rise to the level of a constitutional deprivation. S.C. App. 30a-42a. Petitioners appealed their Eighth and Fourteenth Amendment claims to the Third Circuit. On September 13, 2010, the Third Circuit affirmed the District Court's granting of summary judgment. S.C. App. 1a. Petitioners sought a rehearing *en banc* which was denied on October 22, 2010. S.C. App. 43a.

By way of background, Petitioner was committed to New Castle in February 2006 at the age of 17. A-0065. Petitioner played tackle football at New Castle without equipment on several occasions prior to the day he was injured. A-0024. Respondents Willie Blue, Omar Stuart, and Tammy Odem, who were aides and counselors at New Castle, were present and watched the children play tackle football without equipment. A–0288-89, A–0424, A-0447, A-0471 and A-

0496. At no time did the staff tell residents that tackle football was not permitted; in fact, Petitioner believed it was allowed. A-0289.

The tackle football games at New Castle were violent, aggressive and often caused injuries. A-0402, A-0448, A-0452 and A-0424. Indeed, these tackle football games were so popular and pervasive that multiple staff regularly bet on the games. A-0475. The vicious games of tackle football, without equipment, were encouraged by Respondents as a means of conflict resolution such that the children could take their aggressions out on opposing players. A-0394.

On April 29, 2006, at approximately 9:00 a.m., Respondents Stuart, Blue and Odem took ten students, including Petitioner, into the yard to play tackle football. A-0342. It was the Pittsburgh residents against the Philadelphia residents. A-0300 and A-0385.

Respondents Blue, Stuart and Odem were seated in chairs on the side of the field. A-0342. The game started and the residents from Philadelphia received the ball first and had four plays. A-0306. It was a very aggressive game with hitting after the plays. A-0386. The residents from Pittsburgh then received the ball and scored a touchdown. A-0306 and A-0387. The Pittsburgh team then threw the ball down-field (as a simulated kick-off) and Petitioner tackled resident George Dockery, who had picked up the ball after it bounced off the ground. A-0307, A-0387, A-0425 and A-0501.

Following the collision, Petitioner fell to the ground; he said, "I can't get up." A-0502, A-0308 and A-

0388. He was coughing blood. A-0388. Respondent Stuart was the first staff member that ran to him and in callous disregard for Petitioner's health and welfare said "This is touch football. Tell them this was touch football, not tackle." A-0308 and A-0389. Petitioner again said," I can't breathe" and Respondent Stuart replied: "Just say it was touch." A-0309.

Following his catastrophic injury, Petitioner was rushed to Jameson Hospital by ambulance. A-0615. From Jameson Hospital he was flown by helicopter to Saint Elizabeth Hospital in Youngstown, Ohio. A-0181 and A-0629.

After the football game, students were told by New Castle staff to write statements indicating that Petitioner was injured during a game of touch football. A-0391. The New Castle staff informed the children that they would get a pizza party if they told investigators "that it was a touch football game and not a tackle football game." A-0502-03.

Today, Petitioner is a quadriplegic and requires nearly 24 hour nursing supervision. A-0237, A-0239 and A-0242.

REASONS FOR GRANTING THE PETITION

The treatment a prisoner receives and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment. *Helling v. McKinney*, 509 U.S. 25, 31-32 (1993). This Court explained:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well being.... The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment ....

"A prison official's deliberate indifference to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). To prove an Eighth Amendment violation against a prison official, Petitioner must meet two requirements: (1) "the deprivation alleged must be objectively, sufficiently serious;" and (2) the "prison official must have a sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).[2] The

---

[2]Petitioners are no longer pursuing their claim against New Castle directly. However, the Eleventh Amendment provides no immunity to the individual Respondents acting in their individual capacities. *See Hafer v. Melo*, 502 U.S. 21, 26 (1991). "It has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he deprived another of a federal right under the color of state law. [ ] The Eleventh Amendment does not bar such suits, nor are state officers absolutely immune from personal liability under §1983 solely by virtue of the 'official' nature of their acts." *Hafer*, 502 U.S. at 30. The Eleventh Amendment does not bar suits for damages against government officials sued in their personal capacities. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, here,

state of mind is one of "deliberate indifference" to inmate health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference requires a showing that the official was subjectively aware of the risk. *Id.* at 828.

A. Statistical Likelihood of Paralysis Is Not Required Under Eighth Amendment Jurisprudence.

The Third Circuit required statistical support, regarding the frequency of catastrophic injuries when playing tackle football without equipment, in order to establish an Eighth Amendment violation. S.C. App. 22a. No Supreme Court case has required statistical support regarding the frequency of a past injury under Eighth Amendment jurisprudence.[3] The Third Circuit improperly expanded the requirements for an Eighth Amendment violation by mandating statistical proof of harm and pulled *Helling v. McKinney*, 509 U.S. 25 (1993) too far from its moorings.

The Third Circuit acknowledged numerous expert reports produced by Petitioner and stated "While Betts submitted expert reports concluding that his injury was caused by his tackle and that cervical spine injuries have occurred in other football games, these reports offer no insight into the frequency or

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immunity provided to New Castle under the Eleventh Amendment does not prevent a claim against the individual Respondents.

[3]The Supreme Court in *Helling v. McKinney*, 509 U.S. 25 (1993) merely reasoned that a statistical inquiry *may* be relevant regarding the "potential" harm involving *future* exposure to second-hand smoke. However, Petitioner is not seeking redress for exposure to a future harm; rather, the injury has already occurred.

likelihood of such injuries." S.C. App. 12a. The Third Circuit concluded that Petitioner presented no evidence that playing tackle football without equipment poses a "substantial risk" of serious harm. S.C. App. 11a-12a. The Third Circuit believed that Petitioners' sole argument was that playing tackle football without protective equipment was "sufficiently obvious that any reasonable adult would realize it." S.C. App. 12a. The Third Circuit deviated from Supreme Court precedent and was incorrect for several reasons.

First, this Court has never required statistical evidence to establish an Eighth Amendment claim. *See Farmer v. Brennan*, 511 U.S. 825 (1994) (no statistical evidence required to establish risk of harm posed to a transsexual by general population); *Hudson v. McMillan*, 503 U.S. 1 (1992) (no statistical evidence required to establish excessive force used by correctional officers against inmate); and *Hope v. Pelzer*, 536 U.S. 730 (2002) (no statistical evidence required when prisoner was handcuffed to post without regular water or bathroom breaks). The list of cases that do not require statistical support in order to establish an Eighth Amendment claim can go on *ad infinitum*.

Just as statistics in those cases were not required, here, statistics for injuries related to tackle football, without protective equipment, are neither required nor amenable to statistics. The outrageous conduct is so rare that it escapes statistical inquiry. Nevertheless, the Third Circuit cited http://www.unc.edu/depts/nccsi/2009ALLSPORT.pdf for the proposition that serious injuries in football rarely occur. S.C. App. 22a fn. 9. The Third Circuit

erred by citing an article involving supervised high school students playing tackle football **with equipment**. The failure to provide equipment and training is what makes the risk of harm substantial in this case. In fact, according to the article cited by the Third Circuit, in 2008, 43 students in high school, alone, suffered catastrophic injuries while playing tackle football – and that was with protective equipment and coaching.

Second, even under the unconstitutional standard established by the Third Circuit, Petitioner still produced objective evidence regarding the substantial risk of harm in playing tackle football without protective equipment. For instance, Petitioner produced an expert report from Robert C. Cantu, M.D. Dr. Cantu, a neurosurgeon, is a consultant to the Boston College Eagles football team, NFL Concussion Committee and Medical Director, National Center for Catastrophic Sports Injury Research. Dr. Cantu stated:

> [A]llowing youths, including Eric Betts to play tackle football *without necessary protective equipment exposed Eric to an unreasonable risk of harm. Protective equipment is an absolute necessity when playing tackle football to prevent catastrophic injuries from occurring.*

SA-0796-0801.

Petitioner produced an expert report from Joseph S. Torg, M.D. Dr. Torg is a Professor of Orthopaedic Surgery at Temple University School of Medicine and has been the Team Physician for the

Philadelphia Eagles, Philadelphia 76'ers and Philadelphia Flyers. Dr. Torg stated:

> Clearly this was not a "freak injury" but the result of purposeful head first contact by Eric Betts with the ball carrier, the exact mechanism that has resulted in the hundreds of football cervical spine injuries documented over the past 35 years.

SA-0957-0958.

Petitioner also produced an expert report from Richard P. Borkowski, Ed. D., C.M.A.A. Dr. Borkowski is a Sports and Recreation Safety Consultant. Dr. Borkowski stated that tackle football is associated with the greatest number of catastrophic injuries among all sports. In support of his position, Dr. Borkowski cited *Tackling A Problem: Reducing Catastrophic Football Injuries, Mueller, FO, Sportcare and Fitness*, May/June 1989. SA-0760-0795.

Thus, it cannot be said that Petitioner's sole argument was that playing tackle football without protective equipment was "sufficiently obvious that any reasonable adult would realize it." (S.C. App. 12a). Rather, Petitioner produced expert reports outlining the objective and substantial risk of harm in playing tackle football without protective equipment.

In sum, the Third Circuit's conclusion that Petitioner (1) needed statistical evidence to demonstrate "substantial risk" and (2) failed to establish that a serious injury will result from playing tackle football without equipment, is without merit and

contrary to long-standing Eighth Amendment jurisprudence.

B. Respondents Knew That Allowing Children to Play Full Contact Football Without Protective Equipment Presented a Serious and Excessive Risk of Harm to Petitioner.

The Third Circuit held that Respondents were not deliberately indifferent to a substantial risk of harm. S.C. App. 14a-16a. The Third Circuit reasoned that to show the requisite culpability of New Castle staff members, Petitioner must demonstrate that Respondents were "aware of facts which the inference could be drawn that a substantial risk of harm exists" and that they "also drew the inference." S.C. App. 15a-16a. The Third Circuit held "it is not obvious that the risks associated with playing tackle football without equipment are unreasonable." S.C. App. 16a. However, this Court has held that "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a fact-finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. Here, Defendants *knew* that allowing inmates at New Castle to play tackle football without equipment presented an *excessive* and *unreasonable* risk of serious harm.

For instance, Respondent Stuart testified, in part, as follows:

A. Growing up people would tell you that you shouldn't play football without equipment.

Q. Sure. And you understood why? The protective equipment was to help you avoid serious injury; right?

A. Yes.

Q. And certainly before the Eric Betts incident happened, that was something that you *knew*, correct?

A. *Yes.*

A-0602. Moreover, Respondent Stuart testified that he *knew* paralysis was a risk of playing tackle football without equipment. In that regard, he testified as follows:

Q. And you probably also understood that it's *even more dangerous if you don't have equipment at all* and you are playing tackle football; correct?

A. *Correct.*

A-0604. Thus, Respondent Stuart knew that permitting children to play tackle football without protective equipment posed a substantial, excessive and unreasonable risk of injury because it was even more dangerous than tackle football with equipment.

Similarly, Respondent Blue testified, in part, as follows:

Q. In fact, I believe you told me that you *knew* that there were people who suffered

spinal cord injuries playing tackle football; correct?

A. *Yes.*

Q. And did you also, sir, have an understanding that people wore equipment, protective equipment, when they played tackle football to try to avoid serious injuries. That much you would have *known*; correct?

A. *Yes.*

A-0357.

Further, Respondent Odem testified to having understood the risk of serious injury associated with allowing the children to play tackle football without protective equipment. Her testimony in that regard reads as follows:

Q. Did he specifically tell you that the students were not allowed to play tackle football?

A. We are not allowed. That is a liability upon New Castle.

Q. Why is that a liability?

A. Because we don't want a student to get hurt.

Q. You certainly understood and you didn't need anybody to tell you that if these students played tackle football, that they were put at risk of serious injury; correct? You knew that; correct?

A. On that part, *common sense* wise, yes.

A-0637.

Respondent Mitcham, New Castle's Secured Treatment Program Director, testified as to the unreasonable risk of injury from playing tackle football without equipment as follows:

> Q. That playing - - that having these students play tackle football without protective equipment *presents an unreasonable risk* of harm and injury to them, that fact. In other words, you don't have to tell the staff that? That's something they should understand; is that right?
>
> A. I would have to say *yes*.

A-0180.

The obvious nature of the risk of serious harm was further testified to by New Castle aide Rodney Tubbs as follows:

> Q. One of the things that you understood during your time here at New Castle and you understand even to this day, is that students at this age playing full contact tackle football without protective equipment would put themselves at risk of serious physical injury, correct?
>
> A. That is correct.
>
> Q. And you've known that the entire time you've been here, correct.
>
> A. Yes, sir.
>
> Q. And that's a risk that you certainly would consider to be an *obvious risk*?
>
> A. *Yes, sir.*

A-0507.

At some point, the obviousness of the substantial risk in permitting Petitioner to play tackle football, without equipment, is established when nearly every Respondent admits the activity poses an unreasonable and substantial risk of serious injury.[4]

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[4]Moreover, playing tackle football, without protective equipment, as form of aggression management is not a risk society would tolerate. Every reasonably administered institution that sanctions tackle football games – does so with equipment. Imagine the parental outcry if institutions around the nation began playing tackle football without equipment. Mothers and fathers, in droves, would take their children out of the sport.

In fact, under almost identical circumstances and facts, at least one court has held prison officials liable for injuries, including quadriplegia, as a result of allowing inmates to play tackle football without protective equipment. In *Schnetz v. Ohio Dept. of Rehab. and Correction*, Case No. 2006-07406 (Court of Claims of Ohio 2009), the court awarded damages to an inmate that became a quadriplegic after playing tackle football without equipment. The *Schnetz* court held that evidence established that correction officers either knew that a game of tackle football was taking place and chose not to stop it or they failed to discover such a game within a reasonable period of time. While *Schnetz* involved a claim of negligence, this case squarely addresses that reasonable minds may differ on the inherent risks of playing tackle football without equipment and further buttresses the well-settled principle that "whether or not a defendant's conduct amounts to deliberate indifference is a classic issue for the fact finder." *See A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 588 (3d Cir. 2004) ("whether or not a defendant's conduct amounts to deliberate indifference has been described as a 'classic issue for the fact finder' and 'a factual mainstay of actions under [§] 1983' "); *Armstrong v. Squadrito*, 152 F.3d 564, 577 (7th Cir. 1998). Thus, a determination of whether the risk of injury was "substantial" was for a jury to determine – not the Third Circuit.

In fact, two cases addressed at length during oral argument, *Hillard v. Lampeter-Strasburg School District*, 2004 WL 1091050 (ED. Pa. May 13, 2004) and *Sciotto v. Maple Newton School Dist.*, 81 F. Supp. 2d 559 (ED.Pa. 1999), are instructive to demonstrate Respondents' deliberate indifference to a substantial risk of harm. However, neither case was addressed nor distinguished by the Third Circuit.

In Hillard v. Lampeter-Strasburg School District, 2004 WL 1091050 (ED. Pa. May 13, 2004), during an athletic taping course, defendants employed a "Fly on the Wall" exercise. Students were divided into groups; the group selected a member to stand on a chair against the wall while the group tapes the student to the wall with duct tape. The group with the "fly" who stays attached to the wall the longest wins the exercise. In *Hillard*, plaintiff slipped off the chair and struck her head on the concrete floor, causing severe injuries.

Although *Hillard* involved a Fourteenth Amendment claim, the court held that the appropriate standard to apply was "deliberate indifference." *Hillard*, 2004 WL 1091050 at 4. Thus, the standard applied in *Hillard* (deliberate indifference) is the same for an Eighth Amendment claim.[5] The *Hillard* court reasoned that defendants' decision to allow the taping of students above a concrete floor "without taking precautions, such as putting mats on the floor, tends to show a disregard for safety amounting to deliberate indifference." *Id.* at 5. Here, just as in *Hillard*, Respondents' decision to encourage tackle football,

[5]Petitioners raised claims under both the Eighth Amendment and Fourteenth Amendment below.

without taking precautions, such as equipping Petitioner with protective equipment, or providing coaching/instruction shows a disregard for safety amounting to deliberate indifference to a substantial risk of harm.

Equally analogous is *Sciotto v. Maple Newton School Dist.*, 81 F. Supp. 2d 559 (ED.Pa. 1999) wherein a high school wrestling student brought a constitutional violation claim for injuries sustained while practicing with college alumnus invited by the wrestling coach. Applying the deliberate indifference standard, the court reasoned that defendants (1) had knowledge of the tradition of inviting older, heavier and more experienced wrestlers to practice; (2) had knowledge of a prior injury to another student under similar circumstances; and (3) an expert report indicated that a reasonably knowledgeable wrestling official would recognize the danger. Here, just as in *Sciotto*, Petitioner produced evidence that Respondents were aware that tackle football games were played at New Castle and, in fact, encouraged and bet on the games. Here, just as *Sciotto*, there was evidence of prior injuries from tackle football games at New Castle. Finally, here, just as in *Sciotto*, several experts stated in their reports that a reasonable official would recognize the danger of permitting youth offenders to play tackle football without protective equipment.

Thus, if taping a student to a wall and permitting smaller wrestlers to compete with larger wrestlers is sufficient to establish deliberate indifference, certainly pitting aggressive juvenile offenders against one another in a game of tackle football as form of conflict resolution, without equipment, is sufficient to establish

deliberate indifference under the Eighth Amendment.

CONCLUSION

The Third Circuit's decision now allows prison officials, youth supervisors, counselors, and teachers to encourage children to play tackle football, without equipment, and without consequences. As a result, for the reasons set forth above, Petitioners respectfully request the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 09-3753

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERIC M BETTS; SUSAN BETTS,
Appellants

v.

NEW CASTLE YOUTH DEVELOPMENT CENTER; KENNETH WENT, in his individual and official capacity; CHARLES MITCHAM, in his individual and official capacity; DAVID TOMOCHECK, in his individual and official capacity; OMAR STUART, in his individual and official capacity; WILLIE BLUE, in his individual and official capacity; TAMMY A ODEM, in her individual and official capacity; JOHN DOE, in his individual and official capacity

May 18, 2010, Argued
September 13, 2010, Filed

On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. No. 07-cv-00337).
District Judge: Honorable David Stewart Cercone.

COUNSEL: For Appellants: Robert Ross [Argued], Ross, Fuller & Casey, Philadelphia, PA.

For Appellees: John G. Knorr, III [Argued], Office of Attorney General of Pennsylvania, Harrisburg, PA; Mary L. Friedline, Mariah Passarelli, Office of Attorney General of Pennsylvania, Pittsburgh, PA.

FUENTES, HARDIMAN and NYGAARD, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, *Circuit Judge.*

On Saturday, April 29, 2006, seventeen-year-old Eric Betts suffered a tragic spinal cord injury while attempting to make a tackle during a "pick-up" football game at the New Castle Youth Development Center (YDC). Following the injury, Betts sued YDC and several of its staff members pursuant to 42 U.S.C. § 1983, claiming various constitutional violations. The District Court entered summary judgment for YDC and its staff in their official capacities, finding them immune from suit under the Eleventh Amendment. Summary judgment also was entered on the merits in favor of the Defendants in their individual capacities. Betts filed this timely appeal.[1]

I.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291.

"Our review of Defendants' entitlement to Eleventh Amendment immunity is plenary." *Haybarger v. Lawrence County Adult Prob. and Parole*, 551 F.3d 193, 197 (3d Cir. 2008). We review the District Court's summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. *See Groman v. Twp. of Manalapan*, 47 F.3d 628, 633 (3d Cir. 1995). Summary judgment is appropriate where

there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(2). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When the moving party has carried its burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). Unsupported assertions, conclusory allegations, or mere suspicions are insufficient to overcome a motion for summary judgment. *See Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989).

II.

The YDC houses youths who have been adjudicated delinquent and committed by Pennsylvania's Juvenile Courts to the care and custody of the Pennsylvania Department of Welfare's Bureau of Juvenile Justice Services. At the time of his injury, Betts had been committed to the YDC's Secure Treatment Program--a maximum security program for serious offenders--and was assigned to one of five residential cottages. Counselors worked in the cottages and were required to accompany the residents at all times. On weekends, residents had "free time" during which they were permitted to use indoor and outdoor basketball courts, several gyms and weight training equipment, a swimming pool, and an outdoor area available for football or walking. During daytime activities such as the football game involved in this case, at least one YDC staff member had to be present for every six residents.

On the day Betts was tragically injured, two counselors accompanied ten residents, including Betts, to the outdoor area to play football. By their previous agreement, residents from Pittsburgh chose to square off against residents from Philadelphia. As was their habit, the residents played tackle football without any equipment. During the course of the fateful game, a player simulated a kickoff by throwing the ball into the air. Betts--who had prior experience playing organized and "pick-up" tackle and touch football--ran down the field "full force" and hit the ball carrier with his head. Betts testified at his deposition that he "really tried to hurt" the opposing player because his "adrenaline was rushing."

Upon impact, Betts fell to the ground and was unable to get up. While Betts was lying on the ground, a counselor advised Betts to tell people he had been playing touch, not tackle, football.[2] An ambulance transported Betts to a local hospital, where he was evacuated by helicopter to St. Elizabeth's Hospital in Youngstown, Ohio. Unfortunately, Betts's spinal cord injury was so severe that it resulted in quadriplegia.

Following the accident, Betts sued YDC and several of its staff members in their official and individual capacities. As relevant to this appeal, Betts claimed his rights were violated under the Eighth and Fourteenth Amendments to the United States Constitution. The Defendants filed a motion for summary judgment, asserting that YDC and its staff in their official capacities were immune from suit under the Eleventh Amendment. The District Court agreed, holding that the Pennsylvania Department of Public Welfare (DPW) is an administrative agency without existence apart

from the Commonwealth. *Betts v. New Castle Youth Dev. Ctr.*, 2009 U.S. Dist. LEXIS 81182, 2009 WL 2913846, at *3 (W.D. Pa. Sept. 8, 2009). And because the YDC is a Pennsylvania state agency "regulated, monitored and maintained" by the DPW, it was entitled to the same immunity. *Id.*[3]

As for Betts's individual-capacity claims against the YDC staff members, the District Court ruled on the merits. On Betts's Eighth Amendment claim, the District Court held there was insufficient evidence to raise genuine issues of fact as to the existence of a substantial risk of serious harm and the Defendants' deliberate indifference to that risk. 2009 U.S. Dist. LEXIS 81182, [WL] at *5-6. Regarding Betts's claims under the Due Process Clause of the Fourteenth Amendment, the District Court held that his claim for deliberate indifference failed for the same reason it failed under the Eighth Amendment and that there was no liability under the state-created danger doctrine because the challenged behavior did not shock the conscience. 2009 U.S. Dist. LEXIS 81182, [WL]at *6-8.

III.

State governments and their subsidiary units are immune from suit in federal court under the Eleventh Amendment, which provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[4] U.S. Const. amend. XI. "The Supreme Court extended the Eleventh Amendment's reach to suits by in-state plaintiffs, thus barring all suits against non-consenting

States in federal court." *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 194 (3d Cir. 2008) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890)). Individual state employees sued in their official capacity are also entitled to Eleventh Amendment immunity because "official-capacity suits generally represent only another way of pleading an action" against the state. *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) (internal quotation marks omitted). However, "[t]he Supreme Court has long held that counties, municipalities, and political subdivisions of a state are not protected by the Eleventh Amendment." *Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229 (3d Cir. 2006) (citations omitted). The party asserting Eleventh Amendment immunity "bears the burden of proving its applicability." *Christy v. Pennsylvania Tpk. Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995).[5]

"[I]n certain instances summary disposition of the eleventh amendment issue is possible," however, in close cases, "evidence beyond the mere statutory language is required." *Blake v. Kline*, 612 F.2d 718, 726 (3d Cir. 1979). When evidence beyond mere statutory language is required, we apply an "oft-reiterated" three-part test to determine "whether an entity is an 'alter ego' or 'arm' of a state for purposes of Eleventh Amendment immunity." *Christy*, 54 F.3d at 1144 (collecting cases). In this case, the District Court did not apply the *Christy* test because it found dispositive the relevant statutory language and Betts's concessions concerning DPW's control of YDC. Betts claims the District Court erred by failing to apply the *Christy* test. We disagree with Betts and, in doing so, endeavor

to clarify when the *Christy* test should and should not be applied.

The fundamental flaw in Betts's argument lies in its fallacious premise, *viz.*, that this is a case where "evidence beyond mere statutory language" is required. As we stated long before *Christy* was decided: "in certain instances summary disposition of the eleventh amendment issue is possible . . . ." *Blake*, 612 F.2d at 726; *see also* Christy, 54 F.3d at 1144 ("In general, a claim of Eleventh Amendment immunity will occasion serious dispute only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state." (citation omitted)). We agree with the District Court that this case is one where summary disposition is not only possible, but appropriate.

As the District Court duly noted, Pennsylvania and federal law establish that the DPW is entitled to Eleventh Amendment immunity because it is an administrative agency without existence apart from the Commonwealth. *See* 71 P.S. § 61 ("executive and administrative work of [the Commonwealth of Pennsylvania] shall be performed by" various executives and administrative agencies, including the "Department of Public Welfare"); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 108 n.16, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (holding that defendants including Pennsylvania DPW, and Pennhurst State School and Hospital--"a state institution"--were entitled to immunity under the Eleventh Amendment); *Lavia v. Pennsylvania Dep't of Corrections*, 224 F.3d 190, 195 (3d Cir. 2000) ("Because the Commonwealth of Pennsylvania's Department of Corrections is a part of

the executive department of the Commonwealth, *see* Pa. Stat. Ann., tit. 71, § 61, it shares in the Commonwealth's Eleventh Amendment immunity."); *Lombardo*, 540 F.3d at 193. As Betts conceded in the trial court, YDC is a Pennsylvania state agency "regulated, monitored and maintained by the [DPW]." Betts, 2009 U.S. Dist. LEXIS 81182, 2009 WL 2913846, at *3 (citing the complaint); *see also Beers-Capitol v. Whetzel*, 256 F.3d 120, 124-25 (3d Cir. 2001) (noting that YDC is "a detention facility for juveniles run by the Pennsylvania Department of Public Welfare"). Accordingly, the District Court concluded that YDC was entitled to the same immunity as the DPW.

The District Court's holding is firmly grounded in Pennsylvania statutory law, which provides:

> "State institutions" means and includes all hospitals for the mentally ill or any other institutions for mentally retarded or epileptic persons, or for juvenile delinquents and dependents, and charitable institutions, within this Commonwealth, maintained in whole by the Commonwealth, and whose boards of trustees are departmental administrative boards within the department.

62 P.S. § 301. The DPW has "supervision over all State institutions," *id.* at §302, and Pennsylvania's statutory scheme for DPW administration of these institutions further evidences that YDC does not have independent status apart from the Commonwealth. *See Id.* at §§ 304 (payment of costs), 305 (DPW control over contracts for repairs, alterations or equipment), 307 (DPW control over contracts for utility services); 308 (DPW authority

to lease land at state institutions to municipalities for purposes of garbage disposal); 342 (DPW power to appoint superintendents of state institutions). This statutory scheme--which explicitly includes institutions for juvenile delinquents within the definition of "state institutions"--is the beginning and the end of the matter for purposes of Eleventh Amendment immunity. This is not a case involving complex institutional arrangements with non-state actors.[6]

In sum, because Pennsylvania law provides, and Betts concedes, that institutions for juvenile delinquents are state institutions existing within the Department of Public Welfare and YDC was, in fact, managed by DPW, we hold that the District Court did not err in granting Eleventh Amendment immunity to YDC and its staff in their official capacities. The District Court was not required to reflexively apply the *Christy* test because YDC is clearly an arm of the Commonwealth under state law.

IV.

Following its initial ruling with respect to the Eleventh Amendment, the District Court proceeded to adjudicate the merits of Betts's claims against the YDC staff[7] in their individual capacities, as required by *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). We turn first to Betts's Eighth Amendment claim.

Betts contends the District Court erred in entering summary judgment on his Eighth Amendment claim because he raised genuine issues of material fact as to

the existence of a substantial risk of serious harm and the Defendants' deliberate indifference to that risk.

The Eighth Amendment's prohibition on "cruel and unusual punishment" restrains prison officials from certain actions (e.g., the use of excessive force against prisoners), and imposes on them a duty to provide "humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). That is, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.'" *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)).[8] For an alleged deprivation to rise to the level of an Eighth Amendment violation, it must "result in the denial of 'the minimal civilized measure of life's necessities.'" *Id.* at 835 (quoting *Rhodes*, 452 U.S. at 347). To prove an Eighth Amendment violation based on a failure to ensure his reasonable safety, Betts must show that the Defendants were "deliberately indifferen[t] to a substantial risk of serious harm." *Id.* at 828. The question of YDC's deliberate indifference is a subjective inquiry, while risk of harm is evaluated objectively. *See Atkinson v. Taylor*, 316 F.3d 257, 262 (3d Cir. 2003).

In *Helling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), an inmate filed suit against prison officials alleging Eighth Amendment violations based on his involuntary exposure to environmental tobacco smoke (ETS) emanating from his cellmate's cigarettes. 509 U.S. at 27 (alleging cellmate smoked five packs a day). The prison obtained a directed verdict

from the district court but the court of appeals reversed in part, concluding that the lower court erred by denying Helling the opportunity to prove his allegations of unreasonable exposure to a future harm. *Id.* at 29.

The Supreme Court affirmed the court of appeals, holding that Helling had alleged a sufficiently serious harm: involuntary exposure to levels of second-hand smoke that created an unreasonable risk of harm to future health. *Id.* at 35. With respect to proving the objective element of a harm rising to the level of a constitutionally serious deprivation on remand, the Supreme Court stated Helling would have to prove that he was exposed to "unreasonably high levels of ETS." *Id.* Such a showing requires "more than a scientific and statistical inquiry into the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS." *Id.* at 36. Objectively serious harm also requires an assessment of society's view of the risk; i.e., whether "it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 36. Thus, under *Helling*, for Betts to satisfy the objective component of his claim he must establish (1) the seriousness of the injury, (2) a sufficient likelihood that serious injury will result from playing tackle football without protective equipment, and (3) the risks associated with permitting youth to play tackle football without equipment violate contemporary standards of decency. Betts easily meets the first factor, but fails the other two.

It goes without saying that quadriplegia is an exceptionally serious harm. But Betts has presented no evidence that playing tackle football without equipment

poses a "substantial risk" of serious harm. Instead, Betts argues that "the risk of serious harm associated with allowing residents to play tackle football without protective equipment is sufficiently obvious that any reasonable adult would realize it." Betts Br. at 19. We disagree with Betts's assertion that the excessive nature of the risk of serious injury from football is obvious.

In support of his claim that the risk of serious harm inherent in playing tackle football without equipment is obvious, Betts cites some of the Defendants' admissions at their depositions that playing football may result in serious injury. Specifically, Betts notes that Counselor Stuart admitted he was aware that New England Patriots wide receiver Darryl Stingley was paralyzed after he was speared by Jack Tatum of the Oakland Raiders during an NFL preseason game in 1978. But the fact that football players have suffered grievous injuries while playing the game sheds no light on the frequency or likelihood of such injuries. The mere possibility that an injury may result from an activity does not mean that there is a "substantial risk" of that injury occurring. *See Baze v. Rees*, 553 U.S. 35, 50, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008) (plurality) ("an isolated mishap alone does not violate the Eighth Amendment . . . because such an event, while regrettable, does not suggest . . . a 'substantial risk' of serious harm."). While Betts submitted expert reports concluding that his injury was caused by his tackle and that cervical spine injuries have occurred in other football games, these reports offer no insight into the frequency or likelihood of such injuries.[9] *See Rish v. Johnson*, 131 F.3d 1092, 1099 (4th Cir. 1997) (affidavit from infectious disease expert regarding CDC-

recommended precautions for preventing spread of disease was insufficient to establish that risk of disease without protective equipment was obvious).

Life is fraught with risk of serious harm and the sports world is no exception. But an Eighth Amendment violation may not be predicated on exposure to *any* risk of serious harm; the risk must be "substantial." *See Helling*, 509 U.S. at 33 (Eighth Amendment claim may be based on a condition of confinement "that is sure or very likely to cause serious illness and needless suffering."). Because the record in this case is devoid of evidence from which a reasonable jury could conclude that serious injury is a common or likely occurrence in tackle football games, the District Court did not err in granting Defendants summary judgment on Betts's Eighth Amendment claim.

Moreover, Betts has failed to show that the risk complained of is one that society would refuse to tolerate. A case from the Court of Appeals for the Seventh Circuit is instructive in this regard. *See Christopher v. Buss*, 384 F.3d 879 (7th Cir. 2004). In *Christopher*, the Seventh Circuit affirmed the dismissal of an inmate's claim that prison authorities had violated his Eighth Amendment rights by failing to correct a "protrusive lip" on the prison softball field that permanently injured his eye after the ball bounced off the lip. *Id.* at 880. The Seventh Circuit held that, even if prison officials knew of and purposefully ignored the defect on the field, the inmate's complaint would fail because "the risk of being hit by a softball as a result of a hazardous field condition is not one that 'today's society chooses not to tolerate.'" *Id.* at 882. "Rather, it is the type of risk many encounter voluntarily when they

play sports in less-than-perfect playing conditions." *Id.* ("To say that 'exposure' to [a substandard field] could violate the Eighth Amendment would be to imply that prison officials violate the Eighth Amendment by letting inmates play sports at all, because the risk of injury, even serious injury, is inherent."); *see also Austin v. Johnson*, 328 F.3d 204, 209 (5th Cir. 2003) ("Requiring youthful offenders to perform military-styled exercises for one day is neither cruel nor unusual; it is a deliberate policy choice to instill much-needed discipline."). So too here. The risks of injury posed by tackle football without equipment do not violate contemporary standards of decency. To the contrary, those risks are assumed daily by the incarcerated and the free alike.

Drawing all inferences in favor of Betts, we hold that no reasonable jury could find that allowing him to play tackle football without protective equipment rises to the level of an objectively serious deprivation of "the minimal civilized measure of life's necessities." Thus, Betts has failed to present a genuine dispute of fact regarding the existence of the objective component of an Eighth Amendment violation.

The District Court also held that Betts failed to establish the subjective element of his Eighth Amendment claim: that Defendants were deliberately indifferent to a substantial risk of harm because there was no evidence of a record of injuries during football games at YDC. Betts argues that he has presented adequate evidence of deliberate indifference in the form of: (1) Defendants' deposition testimony acknowledging the dangers associated with playing football and the increased risk of harm from playing without equipment;

(2) Defendants' admitted failure to train the residents of YDC about proper tackling techniques; and (3) expert reports opining that the Defendants exposed Betts to an unreasonable risk and showed a conscious disregard for his safety.

As explained by the Supreme Court:

> Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however. "After incarceration, only the 'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Whitley v. Albers, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986) (internal citations omitted).

Here, to show the requisite culpability of YDC staff members, Betts must demonstrate that Defendants were "aware of facts from which the inference could be drawn that a substantial risk of harm exists," and that they "also dr[e]w the inference." *Farmer*, 511 U.S. at

837. To overcome a motion for summary judgment, a plaintiff "'must come forward with evidence from which it can be inferred that the defendant-officials were . . . knowingly and unreasonably disregarding an objectively intolerable risk of harm.'" *Beers-Capitol*, 256 F.3d at 132 (quoting *Farmer* 511 U.S. at 846). A plaintiff may demonstrate deliberate indifference by showing that the risk of harm was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past" such that the defendants "must have known" about the risk. *Farmer*, 511 U.S. at 842-43 (internal quotations omitted). Betts has failed to make the requisite showing of deliberate indifference. As previously explained, it is not obvious that the risks associated with playing tackle football without equipment are unreasonable. Although Betts correctly notes that Defendants acknowledged that playing football could result in grievous injury, and that the risk of injury could increase without protective equipment, this does not satisfy the legal standard of deliberate indifference to a *substantial risk* of serious harm. Moreover, there is no evidence of prior serious injuries resulting from resident football games at YDC. Thus, the evidence is insufficient to raise a genuine dispute of material fact regarding deliberate indifference in this case. Accordingly, the District Court did not err in rejecting Betts's Eighth Amendment claim.

V.

Finally, we turn to Betts's Fourteenth Amendment claim that he was deprived of substantive due process. Specifically, Betts contends Defendants were deliberately indifferent to his liberty interest in bodily

integrity and that allowing him to play tackle football without equipment constituted a state-created danger. The District Court rejected both claims, reasoning: (1) because the deliberate indifference necessary for a violation of due process is the same as that for Eighth Amendment violations, Betts's failure to show deliberate indifference in the Eighth Amendment context doomed his substantive due process claim; and (2) Betts failed to establish a state-created danger because the alleged behavior did not shock the conscience. *Betts*, 2009 U.S. Dist. LEXIS 81182, 2009 WL 2913846, at *6-7.

To support his substantive due process claims, Betts points to the same evidence he cited in support of his Eighth Amendment claim. Defendants argue that these claims are barred by the "more-specific-provision rule" because Betts's complaints concerning the conditions of his confinement are properly cognizable under the Eighth Amendment. In the alternative, Defendants contend that the District Court properly found evidence of deliberate indifference to be lacking.

Noting its "reluctan[ce] to expand the concept of substantive due process," the Supreme Court has established the "more-specific-provision rule." *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). Under this rule, "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) (clarifying prior holing in

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)). The Supreme Court explained the rationale behind the rule for Eighth Amendment claims in *Whitley v. Albers*, where a prisoner shot in the leg during a prison riot filed both Eighth Amendment and Fourteenth Amendment substantive due process claims against prison officials:

> [T]he Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified. It would indeed be surprising if, in the context of forceful prison security measures, "conduct that shocks the conscience" or "afford[s] brutality the cloak of law," and so violates the Fourteenth Amendment, were not also punishment "inconsistent with contemporary standards of decency" and "'repugnant to the conscience of mankind,'" in violation of the Eighth. . . . [I]n these circumstances the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause.

475 U.S. at 327 (internal citations omitted). *Compare with County of Sacramento*, 523 U.S. at 843 (rejecting application of more-specific-provision rule to substantive due process claim arising from high speed police chase because facts were not within "search and seizure" protections of Fourth Amendment).

Although we have not previously applied the more-

specific-provision rule in a precedential opinion, at least four of our sister circuit courts of appeals have done so. *See United States v. Hernandez*, 333 F.3d 1168, 1174 (10th Cir. 2003) (analyzing Plaintiff's allegations of governmental invasion of his attorney-client relationship only under Sixth Amendment right to counsel and not under Fifth Amendment Due Process Clause because "[w]here a litigant challenges governmental action under the Due Process Clause and under another, more specific constitutional provision, we analyze the claim under the latter, more specific provision"); *Austin*, 328 F.3d 204, 210 n.10 (5th Cir. 2003) (construing boot camp detainee's complaint as raising claims under only Eighth Amendment: "[b]ecause the Eighth Amendment, as 'an explicit textual source of constitutional protection,' defines the limits of government action, it controls over 'the more generalized notion of substantive due process.'" (quoting *Graham v. Connor*, 490 U.S. at 395 (1989)); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)(dismissing arrestee's substantive due process claim against county coroner alleging falsification of autopsy report because claim fell within more specific provision of the Fourth Amendment); *Tesch v. County of Green Lake*, 157 F.3d 465, 471-72 (7th Cir. 1998) (holding that wheelchair-bound arrestee could not pursue substantive due process claim alleging unnecessary exposure to danger during arrest because allegations fell within more specific provisions of a Fourth Amendment claim for excessive force and unreasonable seizure).

Betts does not cite any case law for the proposition that he may bring both substantive due process and Eighth Amendment claims challenging the same conduct.

Moreover, Betts's claims concern his conditions of confinement and an alleged failure by Defendants to ensure his safety. Because these allegations fit squarely within the Eighth Amendment's prohibition on cruel and unusual punishment, we hold that the more-specific-provision rule forecloses Betts's substantive due process claims.[10]

VI.

In sum, we will affirm the District Court's summary judgment in favor of YDC and its staff in their official capacities because YDC is an arm of the state entitled to Eleventh Amendment immunity. We will also affirm the District Court's summary judgment for the individual Defendants on the merits of Betts's Eighth Amendment claim because Betts failed to show a substantial risk of serious harm that violates contemporary standards of decency and failed to show deliberate indifference. Finally, our adoption of the more-specific-provision rule obviates the need to address Betts's Fourteenth Amendment substantive due process claims.

Footnotes

1Because Betts was a minor at the time of the injury, his mother brought suit as well, seeking compensation for the medical expenses she incurred on behalf of her son. Because there is complete overlap between the claims of Betts and his mother, for the sake of convenience we refer only to Betts.

2Betts testified that the residents always played tackle football, "physical, full contact like the Steelers."

Although some YDC staff testified that the games were touch football, we accept the truth of Betts's version of events for purposes of this appeal.

3The District Court also dismissed Betts's claims under the Fourth and Fifth Amendments to the United States Constitution, but Betts has not preserved those claims for appeal.

4The Supreme Court has explained--and we have recognized--that "'the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity.'" *Lombardo v. Pennsylvania Dep't of Public Welfare*, 540 F.3d 190, 195 (3d Cir. 2008) (quoting *Federal Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753, 122 S. Ct. 1864, 152 L. Ed. 2d 962 (2002)). Thus, the States' sovereign immunity "extends beyond the literal text of the Eleventh Amendment" to comprise more than just immunity from suit in federal court, but also "immunity from liability." *Id.*

5The Commonwealth of Pennsylvania has not waived its rights under the Eleventh Amendment in this case. *See* 42 PA. CONS. STAT. § 8521(b).

6That YDC did not have a Board of Trustees in place for at least two years prior to the time of Betts's accident does not negate that it is a "state institution" under § 301. By law, the Board of Trustees is a "departmental advisory board" within the DPW, 62 P.S. § 301, whose primary responsibilities include making recommendations regarding the management, operations, and policy of the institution, *see id* at § 317. Like the District Court, we are not aware of any

precedent or facts supporting Betts's declaration that the absence of a Board of Trustees turned the YDC into a "rogue institution operating outside the supervision of the Commonwealth." Betts Br. at 13.

7Specifically, Betts sued Kenneth Went, Director of Operations for all youth development facilities; Charles Mitcham, Director of the Secure Treatment Program at YDC; David Tomochek, a Youth Development Counselor Supervisor at YDC; Omar Stuart, a Counselor at YDC; and Willie Blue and Tammy A. Odem, Youth Development Aides at YDC.

8An allegation of an Eighth Amendment 8 violation by a juvenile detention facility official is analyzed under the same rubric as an allegation against a prison official. *Beers-Capitol*, 256 F.3d at 125.

9Despite the potential for serious injury, it appears such injuries occur rarely. A comprehensive report from the National Center for Catastrophic Injury Research--coauthored by one of Betts's experts--states that there are approximately 1.5 million high school and middle school football players participating in the sport each year. Frederick O. Mueller & Robert C. Cantu, *Catastrophic Sports Injury Research Twenty-Seventh Annual Report, Fall 1982 - Spring 2009* (hereinafter "*Report*"), *available at* http://www.unc.edu/depts/nccsi/2009ALLSPORT.pdf (last visited August 17, 2010). The Report finds, based on statistics collected over a 27-year period, that the rate of serious injury (including death and paralysis) from football is "less than one per 100,000 participants." *Id.* at 8; *see also* accompanying data *tables at 5*, *available at*

http://www.unc.edu/depts/nccsi/2009ALLSPORTTABLES.pdf (last visited August 17, 2010).

10In light of our adoption of the more-specific-provision rule, we need not address Betts's arguments under the Fourteenth Amendment regarding deliberate indifference to his right to bodily integrity or the state-created danger doctrine.

2:07cv337

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ERIC M. BETTS and SUSAN BETTS,
Plaintiffs,

vs.

NEW CASTLE YOUTH DEVELOPMENT CENTER, KENNETH WENT, in his individual and official capacity, CHARLES MITCHAM, in his individual and official capacity, DAVID TOMOCHECK, in his individual and official capacity, OMAR STUART, in his individual and official capacity, WILLIA BLUE, in his individual and official capacity, TAMMY A. ODEM, in her individual and official capacity, and JOHN DOE, in his individual and official capacity,
Defendants.

September 8, 2009, Decided
September 8, 2009, Filed

David Stewart Cercone, United States District Judge.

MEMORANDUM OPINION

I. INTRODUCTION

Plaintiffs, Eric M. Betts ("Eric") and his mother Susan Betts ("Mrs. Betts")(collectively "Plaintiffs"), filed the instant action pursuant to 42 U.S.C. § 1983, alleging violations of their rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the

Constitution of the United States by Defendants, the New Castle Youth Development Center (the "YDC"), Kenneth Went ("Went"), Charles Mitcham ("Mitcham"), David Tomocheck ("Tomocheck"), Omar Stewart ("Stewart"), Willia Blue ("Blue"), and Tammy A. Odem ("Odem")(collectively "Defendants"). The Defendants have filed a motion for summary judgment, the Plaintiffs have responded and the matter is now before the Court.

II. STATEMENT OF THE CASE

The YDC at New Castle, Pennsylvania is one of several facilities in the Pennsylvania Department of Welfare's Bureau of Juvenile Justice Services (the "BJJS") which is conducted for youths who have been adjudicated delinquent and committed to the care and custody of the BJJS by Pennsylvania Juvenile Courts. Defendants' Concise Statement of Undisputed Material Facts (hereinafter "Def. CSUMF") ¶ 1. Pursuant to an Order by the Court of Common Pleas of Allegheny County, Pennsylvania, Eric was committed to the YDC's Secure Treatment Program in February of 2006. Def. CSUMF ¶ 2. The Secure Treatment Program is a maximum security program for males adjudicated delinquent for serious offenses. Def. CSUMF ¶ 3. The Secure Treatment Program has eleven (11) youth development aides ("YDAs"), three (3) counselors, a counselor supervisor, two (2) managers and a director. Plaintiffs' Statement of Material Facts (hereinafter "Pl. SMF") ¶ 2. During Eric's confinement, Mitcham was the Director of the Secure Treatment Program. *Id.*

At the YDC at New Castle, there are five (5) cottages within the Secure Treatment Program with

approximately fifteen (15) or sixteen (16) residents per cottage. Def. CSUMF ¶ 4. The counselors and YDAs worked in the residential cottages, and were required to accompany the residents at all times. Pl. SMF ¶ 2; Def. CSUMF ¶ 7. Eric was assigned to cottage 2B and defendant Stewart was his counselor. Def. CSUMF ¶ 5. On weekends, Eric and the other residents had "free time" after they were finished with morning chores, and they were free to decide what they wanted to do with their time - watch television, participate sports activities, etc. - but YDC staff had to be present. Def. CSUMF ¶¶ 8 & 9. The residents had access to indoor and outdoor basketball courts, several gyms, weight training equipment, a swimming pool and a fairly large grass field between cottages 2A and 2B (the "Field") for football or other activities. Def. CSUMF ¶ 10. The Field was visible from inside cottages 2A and 2B, and could be partially seen from Director Mitcham's office. Pl. SMF ¶ 3; Def. Response to Pl. SMF (Def. Resp.") ¶ 3.

On Saturday, April 29, 2006, the residents of 2B asked the staff to allow them to play football in the Field behind the cottages. Def. CSUMF ¶ 18. The staff agreed, and at about 9:15 a.m., ten (10) residents including Eric went out to the Field. Def. CSUMF P 20. Because the YDC requires a ratio of one (1) staff member to six (6) residents, two (2) staff members, Blue and Odem, went outside with the boys playing football, and one (1) staff member, Stewart, remained inside the cottage with the five (5) or six (6) residents who were not playing. Def. CSUMF ¶¶ 22, 23 & 24. The football game was organized such that one team was made up of residents from Philadelphia and the other team consisted of residents from Pittsburgh. Deposition of Rajhib Hankerson ("Hankerson Dep.") p. 14;

Deposition of Diante Wilson ("Wilson Dep.") pp. 11-12. As was normally the case when the residents played football, it was a game of tackle football. Hankerson Dep. pp. 11-16; Wilson Dep. pp. 10-12.

During the game, Eric ran down field during a kick-off[1], collided with another resident who had picked up the ball, fell to the ground and was unable to get up. Pl. SMF ¶¶ 10 & 11. Eric was transferred by ambulance to a local hospital where a medical helicopter was waiting to take him to St. Elizabeth's Hospital in Youngstown, Ohio. Def. CSUMF ¶ 44. Eric suffered spinal cord injuries resulting in quadriplegia. Complaint ¶ 25.

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Pursuant to FED. R. CIV. P 56(c), summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. To support denial of summary judgment, an issue of fact in dispute must be both genuine and material, *i.e.*, one upon which a reasonable fact finder could base a verdict for the non-moving party and one which is essential to establishing the claim. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). When considering a motion for summary judgment, the court is not permitted to weigh the evidence or to make credibility determinations, but is limited to deciding whether there are any disputed issues and, if there are, whether they are both genuine and material. *Id.* The court's consideration of the facts must be in the light most favorable to the party opposing summary judgment and all reasonable inferences from the facts

must be drawn in favor of that party as well. *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 180 (3d Cir. 1999), *Tigg Corp. v. Dow Corning Corp.*, 822 F.2d 358, 361 (3d Cir. 1987).

When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In the language of the Rule, the nonmoving party must come forward with "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P 56(e). Further, the nonmoving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. *Williams v. Borough of W. Chester*, 891 F.2d 458, 460 (3d Cir.1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The non-moving party must respond "by pointing to sufficient cognizable evidence to create material issues of fact concerning every element as to which the non-moving party will bear the burden of proof at trial." *Simpson v. Kay Jewelers, Div. Of Sterling, Inc.*, 142 F. 3d 639, 643 n. 3 (3d Cir. 1998), *quoting Fuentes v. Perskie*, 32 F.3d 759, 762 n.1 (3d Cir. 1994).

IV. DISCUSSION

A. Eleventh Amendment Immunity

Defendants argue that YDC and the individual defendants acting in their official capacities as employees of a state agency are protected by sovereign

immunity. Generally, states are immune from suit by private parties in the federal courts. The Eleventh Amendment of the United States Constitution provides: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Eleventh Amendment, therefore, bars the federal courts from entertaining suits by private parties against states, state agencies, and state officials and employees acting in their official capacities, unless the state has consented to the filing of such suit. *See e.g., Edelman v. Jordan*, 415 U.S. 651, 662, 94 S. Ct. 1347, 39 L. Ed. 2d 662, (1974); *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 238 (3d Cir. 2005); *Laskaris v. Thornburgh*, 661 F.2d 23, 25-26 (3d Cir. 1981).

The Commonwealth of Pennsylvania has not expressly waived its rights under the Eleventh Amendment. *See* 42 PA. CONS. STAT. ANN. § 8521(b) ("Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States."). The Pennsylvania Department of Public Welfare (the "DPW") is an agency that does not have an existence apart from the state and is thus entitled to Eleventh Amendment protection. *See* 71 PA. CONS. STAT. ANN. § 61 (establishing the Department of Public Welfare as an administrative department of the Commonwealth). *See also Nelson v. Pennsylvania Dept. of Public Welfare*, 244 F. Supp. 2d 382, 390 (E.D. Pa. 2002). Plaintiff agrees that the YDC is "a Pennsylvania state agency duly organized and

[existing] under the statutes and ordinances of the Commonwealth of Pennsylvania and regulated, monitored and maintained by the [DPW]". Complaint ¶ 3.

Plaintiff, however, argues that because the YDC did not maintain a Board of Trustees it is a "rogue institution [operating] outside the boundaries of the institution that would otherwise provide [] immunity." Plaintiffs' Brief in Opposition p. 26. Plaintiffs have cited no authority in support of this contention, nor could the Court find any legal support for such theory. Therefore, Plaintiff's claims against the YDC and the individual Defendants acting in their official capacities are barred by the Eleventh Amendment and shall be dismissed. Plaintiff may, however, proceed with his § 1983 claims against the individual Defendants in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)("State officials, sued in their individual capacities, are 'persons' within the meaning of § 1983. The Eleventh Amendment does not bar such suits . . . .").

B. Eighth Amendment Violation

Eric brought suit under 42 U.S.C. § 1983, alleging that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. He contends that the Defendants were deliberately indifferent to an excessive risk to his health or safety by knowing and disregarding the risk presented by allowing residents of the YDC to play full contact tackle football without protective equipment.

Section 1983 does not create substantive rights. It only

provides a remedy for violations of rights protected by other federal laws or by the United States Constitution. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). In order to maintain a § 1983 claim, "a plaintiff must show that the defendant deprived him of a right or privilege secured by the Constitution or laws of the United States while acting under color of state law." *Williams v. Borough of West Chester, Pa.*, 891 F.2d 458, 464 (3d Cir. 1989). Analysis of a § 1983 claim begins by identifying the "exact contours of the underlying right said to have been violated" and then determining "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

Analysis of an Eighth Amendment violation by juvenile detention facility official is the same as that for prison officials. *See Beers-Capitol v. Whetzel*, 256 F.3d 120, 130 (3d Cir. 2001). An Eighth Amendment claim against a prison official must meet two requirements: (1) "the deprivation alleged must be, objectively, sufficiently serious;" and (2) the "prison official must have a sufficiently culpable state of mind." *Beers-Capitol v. Whetzel*, 256 F.3d at 125 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). That state of mind, in cases regarding incarcerated individuals, is one of deliberate indifference to inmate health or safety. *Id.* The two-part test for finding an Eighth Amendment violation by a detention facility official then is: (1) a sufficiently serious constitutional deprivation; and (2) deliberate indifference by the detention facility officials or employees. *Beers-Capitol v. Whetzel*, 256 F.3d at 130.

(1) Serious Constitutional Deprivation

This first element examines whether a prisoner suffered an objectively grave "deprivation [] denying the minimal civilized measure of life's necessities." *Wilson v. Seiter*, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991) (internal quotations omitted). Plaintiffs argue that there is no issue regarding the existence of a sufficiently serious constitutional deprivation in the instant action. They contend Defendants do not dispute that the serious injuries suffered by Eric as a result of Defendants' conduct supports a claim under the Eighth Amendment. In Defendants' argument in support of qualified immunity, however, they specifically state that there is no authority supporting Plaintiffs' contention that allowing the residents to play tackle football rises to the level of a constitutional deprivation. Defendants' Brief in Support p. 21. The Court, therefore, will address the issue in the context of determining an Eight Amendment deprivation.

The Eighth Amendment imposes duties on prison officials to provide prisoners humane conditions of confinement, adequate food, clothing, shelter, medical care and they must "take reasonable measures to guarantee the safety of inmates." *Helling v. McKinney*, 509 U.S. 25, 31-32, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993). A court confronted with a prisoner's Eighth Amendment challenge to the conditions of his confinement should measure the challenged conditions against "the evolving standards of decency that mark the progress of a maturing society." *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L. Ed.

2d 59 (1981). However, "not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S. Ct. 1078, 89 L. Ed. 2d 251 (1986). The *Whitley* Court further instructed:

> After incarceration, only the "'unnecessary and wanton infliction of pain' . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." [citation omitted]. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety. . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause . . .

Id. at 319 (Citations omitted).

In following the instruction of *Whitley*, the United States Court of Appeals for the Third Circuit has found that in determining whether a harm "was sufficiently serious to fall within the Eighth Amendment's zone of protections . . . [a court must inquire] whether the prisoner has been deprived of the minimal civilized measure of life's necessities." *Fuentes v. Wagner*, 206 F.3d 335, 344 (3d Cir. 2000); *Young v. Quinlan*, 960 F.2d 351, 359 (3d Cir. 1992). To establish that one has been deprived of the minimal civilized measure of life's necessities requires a demonstration that one has been denied "basic human needs, such as food, clothing, shelter, sanitation, medical care and personal safety"

from physical assault. *Griffin v. Vaughn*, 112 F.3d 703, 709 (3d Cir. 1997).

Viewing all the relevant facts in the light most favorable to Plaintiffs, a reasonable jury could not conclude that allowing Eric to play tackle football, even without protective equipment, rises to the level of objectively extreme deprivation of "the minimal civilized measure of life's necessities." *Wilson v. Seiter*, 501 U.S. at 298. The residents were not compelled to play a sport, it was not a punishment, but a choice freely made by residents to occupy their free time. Clearly, the YDC residents were permitted to play football. Whether the type of football permitted was touch or tackle is actually irrelevant knowing the risks inherent in participating in the sport of football. It is a sport that involves contact, often times violent contact. Even in touch football games, collisions can occur while blocking, defending and/or attempting to receive a pass, or while simply running around the field at high speed with total disregard for safety concerns.

This Court is unable to find that the conduct of Defendants amounts to a serious constitutional deprivation under the Eighth Amendment when many courts have found that such conduct fails to amount to negligence. See e.g. *Rutter v. Northeastern Co, School Dist.*, 496 Pa. 590, 437 A.2d 1198 (Pa. 1981); *Lynch v. Bd. of Ed. Collinsville Comm.*, 82 Ill. 2d 415, 412 N.E. 2d 447, 45 Ill. Dec. 96 (Ill. Sup. Ct. 1980); *Shabot v. East Ramapo School Dist.*, 269 A.D. 2d 587, 703 N.Y.S. 2d 268 (2000); *Marcantel v. Allen Parish School Bd.*, 490 So. 2d 1162 (La. App. 3d Cir. 1986); *Fortier v. Los Rios Community College District*, 45 Ca. App. 4th 430, 52 Cal. Rptr 2d 812 (Cal. Super. Ct. 1996). Allowing

residents of a detention facility to play football, be it tackle, touch or flag, does not violate contemporary standards of decency and does not reflect "obduracy or wantonness" on the part of Defendants. Accordingly, the Court will grant Defendants' motion for summary judgment on Plaintiffs' § 1983 claim based on the Eighth Amendment.

(1) Deliberate Indifference

Notwithstanding the Court's finding that Eric did not suffer a sufficiently serious constitution deprivation under the Eighth Amendment, the Court will also analyze the second requirement for liability, deliberate indifference. The Supreme Court has held that "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. at 837. The element of deliberate indifference is subjective, not objective, meaning that the official must actually be aware of the existence of the excessive risk; it is not sufficient that the official should have been aware. *Beers-Capitol v. Whetzel*, 256 F.3d at 133. The Third Circuit has expressly adopted the language in *Farmer* stating: "to defeat the summary judgment, [a plaintiff] must present enough evidence to support the inference that the defendants [are] 'knowingly and unreasonably disregarding an objectively intolerable risk of harm.'" *Beers-Capitol v. Whetzel*, 256 F.3d at 132 (quoting *Farmer v. Brennan*, 511 U.S. at 846).

Plaintiffs are unable to show that they faced a "substantial risk of harm" to which the Defendants

acted with "deliberate indifference." See *Farmer v. Brennan*, 511 U.S. at 828-829. The risks of playing football are obvious and there is evidence that Defendants knew of such risks. The predicate substantial risk of harm, however, must be objectively serious. The inherent risks in the sport of football, though obvious, are not the type of risks that are "objectively intolerable." Moreover, the evidence of record does not support Plaintiffs' argument that Defendants knowingly and unreasonably disregarded such risks. Circumstances may suggest that the Defendants had been exposed to information concerning the risk and thus "must have known" about such risks if Plaintiffs are able to present evidence showing that a substantial risk to residents playing football was "longstanding, pervasive, well-documented, or expressly noted by [detention facility] officials." See *Farmer v. Brennan*, 511 U.S. at 842-843. There is no evidence of record that there were prior serious injuries resulting from the residents' football games at the YDC. This Court is unable to find evidence, therefore, that would permit a trier of fact to find either an objectively intolerable risk or a knowing and unreasonable disregard of the risk.

C. Fourteenth Amendment Violation

Eric has a liberty interest in his bodily integrity that is protected by the Fourteenth Amendment. *Ingraham v. Wright*, 430 U.S. 651, 673-674, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977); *Youngberg v. Romeo*, 457 U.S. 307, 315, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). The United States Court of Appeals for the Third Circuit has held that:

> [A] plaintiff must do more than show the defendant could have averted her injury and failed to do so. In order to establish liability a plaintiff must demonstrate both that the defendant's policy, practice, or custom played an affirmative role in bringing about the [consequences] and that the defendant acted with deliberate indifference to [those consequences]. In order to establish deliberate indifference on the part of the defendant, "something more culpable [must be shown] than a negligent failure to recognize [a] high risk of harm" to plaintiffs.

Black by Black v. Indiana Area School District, 985 F.2d 707, 712-13 (3d Cir. 1993) (quoting *Colburn v. Upper Darby*, 946 F.2d 1017, 1025 (3d Cir. 1991); *see also Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044, 110 S. Ct. 840, 107 L. Ed. 2d 835 (1990). Though this is a standard for municipal liability, the standard for personal liability for a constitutional deprivation is similar. For personal liability to exist, a plaintiff must show that: (1) defendants learned of facts or a pattern of conduct that caused, or will cause, harm to plaintiffs; (2) defendants demonstrated deliberate indifference toward the constitutional rights of plaintiffs by failing to take action that was necessary to prevent the harm; and (3) such failure caused a constitutional injury. *See Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 709-710 (E.D. Pa. 2007)(citing *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994); *D.C.G. & P.J.G v. Wilson Area Sch. Dist.*, 2009 U.S. Dist. LEXIS 26446 (E.D. Pa. Mar. 25, 2009). The Court has already determined that there is no record evidence that

establishes the Defendants acted with deliberate indifference.

Plaintiffs' also claim a Fourteenth Amendment violation based upon a "state-created danger" theory. In order to establish a state -created danger claim, Plaintiffs must show:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Bright v. Westmoreland County, 443 F.3d 276, 281 (3d Cir. Pa. 2006). Plaintiffs fail to satisfy the second element requiring a degree of culpability that of shocks the conscience.

The Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043

(1998) cautioned that "the measure of what is conscience shocking is not a calibrated yard stick," *Lewis*, 523 U.S. at 847. Moreover, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." *Id.* at 850. The question of whether a given action shocks the conscience is difficult to quantify. At one end of the spectrum of culpable conduct, negligent behavior can never rise to the level of conscience shocking. *See Lewis*, 523 U.S. at 849. ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). At the other end of the spectrum, actions "intended to injure in some way unjustifiable by any government interest" are those "most likely to rise to the conscience-shocking level." *Id.* Acts that fall between the extremes of mere negligence and harmful intent require courts to make "closer calls," based on a context-specific inquiry. *Id*

The degree of wrongfulness necessary to reach the "conscience-shocking" level, therefore, depends upon the circumstances of a particular case. *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999). For guidance, the Third Circuit has ruled that "[t]he level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Sanford v. Stiles*, 456 F.3d 298, 309 (3d Cir. 2006). It depends in particular on "the extent to which a state actor is required to act under pressure." *Sanford v. Stiles*, 456 F.3d 298, 301 (3d Cir. 2006). A sliding scale is used "upon which the degree of culpability required to establish such a claim must be measured." *Phillips v. County of Allegheny*, 515 F.3d 224, 240 (3d Cir. 2008). Where a defendant is "confronted with a hyperpressurized environment such as a high-speed chase . . . it is usually necessary to show that the officer

deliberately harmed the victim." *Estate of Smith v. Marasco (Smith II)*, 430 F.3d 140, 153 (3d Cir. 2005) (quotations and citations omitted). Where a defendant has "the luxury of proceeding in a deliberate fashion . . . deliberate indifference may be sufficient to shock the conscience." *Id.* Further, where a defendant has to act with some urgency, but does not have to make split-second decisions the defendant's actions must "reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience.'" *Kaucher v. County of Bucks*, 455 F.3d 418, 426 (3d Cir. Pa. 2006)(quoting *Miller v. City of Philadelphia*, 174 F.3d at 375-376).

In *Lewis*, the Court identified deliberate indifference as the appropriate standard for holding prison officials liable for their role in creating unsafe conditions of confinement. The Court noted this standard "rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." *Lewis*, 523 U.S. at 853. Because the deliberate indifference standard governs in the instant action, and because the Court has determined there is no record evidence that establishes the Defendants acted with deliberate indifference, Plaintiffs' § 1983 claim based on the Fourteenth Amendment also fails.

D. Fourth Amendment Violation

In their complaint, Plaintiffs also invoke the Fourth Amendment as a basis for the instant lawsuit. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S.

Const. amend. IV. The Supreme Court has held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officials. *Elkins v. United States*, 364 U.S. 206, 213, 80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960). "The Fourth Amendment's' principal concern . . . is with intrusions on privacy,' and therefore when the infraction deals not 'with the initial decision to detain an accused and the curtailment of liberty that such a decision necessarily entails, but rather with the conditions of ongoing custody following such curtailment of liberty,' then the claim invokes principles of [Fourteenth Amendment] substantive due process." *Gottlieb v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001) (citing *Ingraham v. Wright*, 430 U.S. 651, 674, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977)). The Court is unable to find any evidence of intrusions on Eric's privacy rights in this instance. Moreover, the Supreme Court has concluded that the Fourth Amendment right to privacy, to be free from unreasonable searches and seizures, is fundamentally inconsistent with incarceration. *Hudson v. Palmer*, 468 U.S. 517, 527-528, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984). Accordingly, the Fourth Amendment claim shall be dismissed.

E. Fifth Amendment Violation

To the extent that Plaintiff seeks to invoke the Fifth Amendment's due process clause, such claim fails as a matter of law because the Fifth Amendment's due process clause applies against Federal government actors whereas all of the defendants in the complaint are state government actors and so, are covered by the Fourteenth Amendment's due process clause which we have already analyzed above. *See Riley v. Camp*, 130

F.3d 958, 972 n.19 (11th Cir. 1997)("The Fifth Amendment obviously does not apply here--the acts complained of were committed by state rather than federal officials."). Accordingly, Plaintiffs' § 1983 claim based on the Fifth Amendment shall be dismissed.

V. CONCLUSION

Based on the foregoing, the Court will grant the motion for summary judgment in favor of Defendants [2] on Plaintiffs' § 1983 claims based on the Fourth, Fifth Eighth and Fourteenth Amendments. An appropriate order will follow.

/s/ David Stewart Cercone
David Stewart Cercone
United States District Judge

Footnotes

1 The football was not kicked, however, the ball was thrown to simulate a kick-off.

2 Because the Court determined that Plaintiffs failed to show a constitutional violation, there was no need for the Court to address the qualified immunity issue.

10/22/2010
No. 09-3753
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERIC M BETTS; SUSAN BETTS,
Appellants

v.

NEW CASTLE YOUTH DEVELOPMENT CENTER; KENNETH WENT, in his individual and official capacity; CHARLES MITCHAM, in his individual and official capacity; DAVID TOMOCHECK, in his individual and official capacity; OMAR STUART, in his individual and official capacity; WILLIE BLUE, in his individual and official capacity; TAMMY A ODEM, in her individual and official capacity; JOHN DOE, in his individual and official capacity

On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. No. 07-cv-00337).
District Judge: Honorable David Stewart Cercone.

Present: McKEE, Chief Judge, SLOVITER, SCIRICA, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, and NYGAARD , Circuit Judges*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing en banc filed by Appellants

having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing en banc is DENIED.

BY THE COURT:
/s/ Thomas M. Hardiman
Circuit Judge

Dated: October 22, 2010

Footnote

*The Honorable Richard L. Nygaard's vote is limited to panel rehearing.